IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959.

**No. 546.**

ALDEN D. STANTON and LOUISE M. STANTON,
*Petitioners,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR PETITIONERS.

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## BRIEF FOR PETITIONERS.

### Opinion Below.

The opinion and dissenting opinion in the Court of Appeals (R 82-89) are reported at 268 F. 2d 727. The findings of fact and conclusions of law of the District Court (R 60) are not reported. However, there is a reported memorandum of the District Court on petitioners' motion for summary judgment reported at 137 F. Supp. 803 and printed R 11-15.

### Jurisdiction.

The judgment of the Court of Appeals was entered on July 6, 1959. The petition for a writ of certiorari was

filed November 27, 1959 and granted December 14, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## Questions Presented.

The ultimate question is whether the majority of the Court of Appeals erred in reversing the District Judge's finding that Trinity Church made a gift to Alden D. Stanton. To determine this question it is necessary to decide one or more of the following:

(1) whether the findings of fact by the trial judge on the basis of oral and documentary evidence were clearly erroneous;

(2) whether this Court should overrule its prior decision squarely in point, defining a gift;

(3) whether the explicit exemption by Congress of gifts from income tax is an appropriate subject for restriction by appellate courts.

## Statutes Involved.

Internal Revenue Code of 1939 (26 U. S. C. Section 22, 1952 ed., as applicable for the years 1942 and 1943):

SEC. 22. *Gross Income.*

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain

or profit, or gains or profits and income derived from any source whatever. * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * * * *

(3) *Gifts, bequests, devises, and inheritances.* The value of property acquired by gift, bequest, devise, or inheritance. There shall not be excluded from gross income under this paragraph, the income from such property, or, in case the gift, bequest, devise, or inheritance is of income from property, the amount of such income. * * *.

RULE 52. *Federal Rules of Civil Procedure, Findings by the Court.*

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

## Statement.

Alden D. Stanton was responsible for the financial affairs of the Corporation of Trinity Church in Manhattan, which exists under a Charter from Queen Anne. He was its comptroller. He was also president of a real estate holding corporation wholly owned by Trinity Church (R 62). On November 5, 1942, he submitted his resignation in order to go into business for himself (R 37). He was asked to reconsider (R 22). However, Stanton adhered to his decision to resign. Stanton's salary, fully paid through the effective date of his resignation, was $22,500 (R 55). His successor received only $12,000, about half that (R 81).

Two weeks thereafter, on November 19, 1942, the members of the vestry who comprised the directors of Trinity Church's real estate holding company made a gift to him (R 62). The uncontradicted oral testimony was that the gift was an "evidence of good will" (R 37); that he "was liked by all of the members of the vestry personally" (R 26-27). The gift was in the amount of $20,000, and approximately half thereof was paid by the Corporation of Trinity Church and half by its subsidiary (R 12).

It was only after he had departed that any part of the gift was received. The gift was made and the delivery thereof authorized in accordance with the following preambles and resolution (R 62):

> "WHEREAS Mr. Alden D. Stanton has tendered his resignations from all the offices he held under the Corporation of Trinity Church and its subsidiaries; and
>
> "WHEREAS said resignations have been accepted, to be effective as of November 30, 1942;

> "Be it resolved that in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars, payable to him in equal installments of Two Thousand Dollars at the end of each and every month commencing with the month of December, 1942; provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942."

Trinity and its subsidiary had a pension plan to which the employer and the employee contributed. Upon termination of employment, an employee's rights were limited to

(1) electing to have his own contributions refunded, or

(2) electing to have his own contributions spent to purchase insurance policies.

Stanton elected to receive back his own contributions (R 30, 51).

The donative resolution contained a proviso making clear that neither Stanton nor Trinity was required to make additional contributions to the pension plan *after* the effective date of Stanton's resignation on account of the gift. Its effect was also to preclude any heir or legal representative from claiming that new pension rights or benefits arose after November 30, 1942, the effective date of the resignation (R 62, 29).

The resolution was drafted by Woolsey A. Sheppard, Esq., for many years a vestryman of and counsel to Trinity Church. Mr. Sheppard testified that it was the intention of the vestrymen to make Mr. Stanton a gift (R 26-27).

Neither Trinity Church nor its subsidiary received any federal tax benefit directly or indirectly, since both were charitable corporations exempt from income tax (R 23, 38). Payments were entered on the books of the donors as a gratuity (R 33). Another vestryman and director stated that it was the unanimous intent of all of the directors to make Mr. Stanton a gift (R 36-37). Stanton did not vote on the resolution (R 25). There was no withholding (R 23, 38) which would have been required from compensation. There was no business purpose in making the gift (R 25, 38). Stanton received his entire salary through the effective date of his resignation (R 22, 38). Stanton performed no services thereafter, nor did he refrain from doing anything (R 25, 37, 52, 55).

Stanton had no claim against Trinity or the operating company (R 22, 52). He did not request any payment (R 26) nor have any voice in voting it (R 25, 26, 38, 52). Stanton was held in high regard by the vestry and the directors (R 26, 27, 37).

The directors and vestry felt he had come in when Trinity's affairs were in a "difficult situation" and had done "a splendid piece of work" (R 27). Stanton also considered the payments a gift (R 52) and so designated them on his tax returns (R 55).

The case may be summarized in

(a) the resolution set forth on pages 4-5 hereof awarding a "gratuity".

(b) the testimony of Woolsey A. Sheppard, Esq., counsel who drafted the resolution, who voted for the resolution as a director of the operating company and who ratified it as a member of the vestry (R 26-27):

> "Mr. Lee: 'Q. Can you state what the intent of the board of directors was in adopting such resolu

tion? A. Yes, based on the discussion which took place in the meeting, Mr. Stanton was liked by all of the Vestry personally. He had a pleasing personality. He had come in when Trinity's affairs were in a difficult situation.

"He did a splendid piece of work, we felt.

"Besides that, as I say, he was liked by all of the members of the Vestry personally.

"Q. Is it your testimony, Mr. Sheppard, that it was the intention of the Board of Directors to make Mr. Stanton a gift? A. No question about it.'"

(c) the testimony of Frederick E. Hasler, then Chairman of the Continental Bank and Trust Company, who voted for the resolution as a director of the operating company, who ratified it as a vestryman, and who now serves as Senior Warden of Trinity Church (R 36-37):

"Q. On the basis of your participation in that meeting, and your voting, can you state what the intent of the Board of Directors was at the time of the adoption of that resolution?

"Mr. Rita: I object on the ground that the witness is incompetent to so testify.

"The Court: I will allow the witness to say what he heard any other directors say on the subject, and what he himself said, if he said anything, prior to the adoption of the resolution.

"Q. Mr. Hasler, this meeting took place in 1942. Could you possibly recall anything which you or any other member of the Board said at that time? A. Yes sir, we were all unanimous in wishing to make Mr. Stanton a gift.

"Mr. Stanton had loyally and faithfully served Trinity in a very difficult time. We thought of him in the highest regard.

"We understood that he was going in business for himself.

"We felt that he was entitled to that evidence of good will."

All legal and factual questions were stipulated except the nature of the $20,000 payment to Stanton (R 18, 60). Plaintiffs moved for summary judgment. The motion was denied in order to permit the government to have an opportunity to cross-examine (R 15).

As the facts set forth in Judge Abruzzo's memorandum denying the motion for summary judgment clearly show (R 11-15), the *only* question left for trial was the credibility of oral testimony.

The government produced no witnesses, and the testimony of the disinterested donor, through responsible witnesses, was that a gift was intended and made.

This testimony was believed by the trial court, as is evidenced by its decision (R 60) rendered from the bench. Jurisdiction was conferred on the District Court by 28 U. S. C., Sections 1346 and 1402 (a) governing suits for refund of taxes illegally exacted.

Despite these findings of fact by the trial court, a majority of the Court of Appeals reversed over the dissenting opinion of Judge Hincks, who not only found the majority opinion to be in conflict with binding authority, but also to be beyond the power of an appellate court over findings by the trier of facts.

## Summary of Argument.

### A.

The Internal Revenue Code of 1939 is a specific expression of the will of Congress. The particular provision under consideration here "excludes" the value of property acquired by gift, and "exempts" it from income tax. This

has been in the law since 1913 to the present day, except for a brief interval under the 1916 Act.

Thus, Congress has looked upon the exclusion and exemption of gifts from income tax as one of the fixed points in its scheme of taxation, and one which is peculiarly within the province of Congress to maintain or to change at its pleasure.

Congress was aided by this Court's interpretation prior to both the Internal Revenue Code of 1939 and that of 1954, and chose to reenact the statute without change in this provision.

This Court's interpretation, successively approved by Congress, has occasioned no difficulty to, and has been followed many times by, the lower courts. But, in the case at bar a divided court purported to distinguish it, over the dissent of a judge who felt that the decision was in square conflict with this Court's interpretation.

**B.**

Put briefly, this Court believed that the facts and circumstances surrounding a payment should be examined to determine whether a payment is a gift. If the payment constitutes an inducement of some kind, or is intended to discharge a legal or moral obligation, then the payment is income and not a gift. On the other hand, if the evidence tends to show that the payment was not an inducement, and the payment was not in discharge of a legal or moral obligation, then the payment may be found by the trial court to be a gift.

Obviously, blood relationships are a common situation in which a gift might arise. Likewise, long association, in business or otherwise, would be a proper motive to inspire a gift. It was this latter situation which this Court

specifically examined, and found a gift had been made to a former employee.

By contrast, the majority below reversed the trial court and wrote an opinion which, for practical purposes, eliminates faithful stewards and old retainers from the class of people who might receive gifts. Congress has not established any such classifications. Former employees would appear to be among the natural objects of a donor's bounty, and have been understood by courts, and by Congress as well in view of the statute and its history, to be as eligible as others to receive gifts.

This Court believed the significant point was whether the donor made the gift without seeking or anticipating anything in return; not whether the donee occupied some particular relationship to the donor, whether blood, former employment, or otherwise.

Naturally, a determination of this point is one which a trial court is especially well suited to make

C.

The divided court below, however, has gone far toward removing this determination of fact from trial courts and has made an extraordinary departure from the "clearly erroneous" doctrine of Rule 52, FRCP. The Court of Appeals undertook to measure the degree of affection between donor and donee, a criterion which it is in no position to apply—it neither saw nor heard the witnesses, and a criterion which is not present in the statute. While affection might be one of the elements which a trial court would take into account in estimating the donor's desire to be a benefactor, it would not be the sole standard, but might be considered along with goodwill, admiration, esteem, kindliness, and the lack of any inducement in the making of the gift.

The Vestry of Trinity Church regretfully accepted Stanton's resignation, and two weeks thereafter "awarded" him a "gratuity". Witnesses, including Trinity's counsel who drafted the resolution, testified that it was the intent of the donor to make a gift. The payment was not to make up for, or induce anything, since Stanton was fully and quite well paid and was going into business for himself. Rather, it was an expression of goodwill to him because he was well liked personally, and the donor appreciated what he had done in the past.

All the facts and circumstances surrounding the making and delivery of the gift were fully explored on trial, and there was a reasonable basis for the trial court's determination that a gift had been made. Consequently, the trial judge could not have been "clearly erroneous" in making such a determination.

## ARGUMENT.

### I.

### Gifts are excluded from gross income and exempt from taxation by explicit command of Congress.

In 1913,[1] Congress excluded from gross income and exempted from income tax "the value of property acquired by gift". Decades of reenactment in identical words, and in the form of internal revenue codes, hardly permit the conclusion that exemption of gifts from income tax stole

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[1] 38 Stat. 114-116. This provision was apparently omitted for a brief interval under the 1916 Act (39 Stat. 117-57; Act of 1916, Sec. 2); see *Irwin* v. *Gavit*, (2 Cir. 1923) 295 F. 84.

"upon an unsuspecting legislature and pass[ed] unobserved".[2]

The specific portion of the statute (Section 22(b)(3)) relevant here provided:

> "(b) *Exclusions from gross income.* The following items shall not be included in gross income and shall be exempt from taxation under this chapter.
>
> • • • • • •
>
> "(3) *Gifts, bequests, devises and inheritances.* The value of property acquired by gift • • •."

Congress has practiced every variety of its art upon the tax laws. Technical amendments, broad and sweeping revisions, re-arrangements, "riders", codifications—all have been employed. But "the value of property acquired by gift" remains exempt from income tax, as in 1913. These words exist in a statute which is detailed, specific, and imperative; a statute which "partake[s] of the prolixity of a legal code[3] • • •;" which, in very truth, it is.

The more Congress has changed other provisions of the tax laws, the more we must understand that the continued exemption of gifts from income tax is not only explicit, but vehement.

A pursuit of statutory changes[4] sheds no light upon a provision which has not been changed. What Congress has not changed, it has affirmatively reenacted.

In retaining and reenacting the provision under consideration, Congress spoke with a specific, mandatory voice

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[2] *M'Culloch* v. *State of Maryland*, 4 Wheat. 316, 402.

[3] The quotation continues "• • • and could scarcely be embraced by the human mind". *M'Culloch* v. *Maryland*, *supra*, 407.

[4] The immensity of congressional activity is scarcely suggested by the annotations appearing at 26 U. S. C. A. Sec. 22, pp. 39-43, 1955 Ed.

in positive law. Therefore, this case involves no growth or evolutionary principle of common law or constitutional law. This case requires the firm application of a code.

The Sixteenth Amendment is to "endure" and is to be "expounded" as a part of the constitution[5]. It is to be, and has been, "adapted" to the fiscal crises of the nation. Likewise, this Court will not stultify the exercise by Congress of its broad power to define gross income. But the specific exclusion and exemption here before the Court is not to be "adapted". It is to be applied and enforced, unless and until Congress "adapts" it.

## II.

**The statute has been construed correctly by this Court, and Congress has approved this Court's construction.**

This Court's correct construction in 1937 of the Revenue Act of 1928 in *Bogardus* v. *United States*, 302 U. S. 34, has twice been embedded into the statutory exemption in the Codes of 1939 and 1954, to say nothing of other revenue acts which must be understood as approving this Court's construction.

Even were the decision now to be considered wholly wrong, it would work mischief for a court at this late date to excavate the Code and repossess its contribution to the statutory structure, upon which Congress has so long built.

Not only Congress, but the lower courts, except for a divided court in the case at bar, have given full recognition to the decision. Columns in *Sheppard's United States Citations* attest to this.

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[5] *M'Culloch* v. *Maryland*, *supra*, 407, 415.

But nothing could be clearer than that *Bogardus* was correctly decided. The four dissenting Justices, speaking through Mr. Justice Brandeis, hardly differed, if at all, from the substantive interpretation of the majority speaking through Mr. Justice Sutherland.

The minority said:[6]

> "We think there was a question of fact whether payment to this petitioner was made with one intention or the other. A finding either in his favor or against him would have had a fair basis in the evidence. It was for the triers of the facts to seek among competing aims or motives the ones that dominated conduct. Perhaps if such a function had been ours, we would have drawn the inference favoring a gift. That is not enough. If there was opportunity for opposing inferences, the judgment of the Board controls."

Therefore, if the trier of fact had found a gift, the dissenting Justices would have joined in this Court's decision.

In *Bogardus*, this Court held:[7]

> "* * * a gift is nonetheless a gift because inspired by gratitude for * * * past faithful service * * *."

The case at bar held the contrary—that the payment was not a gift because it was in "gratitude" for services rendered by the departed faithful steward. Herein, the majority below noted

> "Indeed the resolution was 'in appreciation of the services rendered' * * *" (R 85).

This Court found no statutory warrant for creating a class of people to whom gifts could not be made merely

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[6] Bogardus *v.* U. S., *supra*, 45.

[7] *Ibid.*, 44.

because they were former employees. The Court below determined the opposite.

In *Bogardus*, a successful corporation was split by putting the liquid assets in a new corporation having substantially the same stockholders. The stockholders then sold the stock of the old corporation to a third party which continued the business of the old corporation and retained many of the employees of the old corporation. The new corporation made voluntary payments to Bogardus and others. The payments were held to be gifts.

It is clear that the motive for making the gifts was gratitude for past faithful service, as this Court stated. It is also clear that the payments were intended to be gifts.

This Court first observed that there was no express agreement to make the payments; that the disbursements were not made under any implied contract for services rendered or to be rendered; and that there was no moral obligation or legal duty to make the payments. There was no anticipated benefit to the payors

> "beyond the satisfaction which flows from the performance of a generous act."[8]

Thus, the situation is identical to that of Stanton, whose resignation had been accepted and who was going into business for himself.

The majority below misplaced this Court's emphasis in *Bogardus* upon there being no "anticipated benefit" to the donor arising out of the payments, and likewise misplaced this Court's further emphasis upon the donor's no longer being "interested" in the goodwill and loyalty of the donee and the success of the donor's future business activities. This Court described the changed relationship between the

[8] *Ibid.*, 41.

donor and the donee in order to show there was no "anticipated benefit". By demonstrating there was no "anticipated benefit", this Court meant it would not be proper to draw an inference of consideration, which would support a further inference of compensation.

But the majority below seized upon the detail rather than the principle, and embraced the peculiarities rather than the substance, and failed to realize that this Court recited the steps in the reorganization as evidence to show a gift was made in the particular case, rather than as indispensable steps in the accomplishment of any future gift. Surely, Trinity Church can make a gift without first forming a new corporation to effectuate it. The result of such misplaced emphasis below was to explore the incidental and adventitious and ignore the generic.

In *Bogardus*, the donors had separated themselves from the donees by splitting up the enterprise and withdrawing from the operating part. In *Stanton*, the donee separated himself from the donor by resignation, accepted by the donor. Obviously, the important point is that making a gift upon termination of relationship has no tendency to promote the economic interest of the donor in the future. Any promotion of economic interest in the future might lead to an "inference" of consideration supporting a further inference of compensation, irrespective of whether the termination of relationship was occasioned by resignation or corporate reorganization.

In Judge Hincks' dissenting opinion in this case (R 86), he properly points out that the shifting relationships in *Bogardus* did not determine the nature and quality of the payment, a point which Judge Hand had affirmatively made in the lower court opinion in *Bogardus*.

The essence of the case is in this Court's statement:[9]

> "There is entirely lacking the constraining force of any moral or legal duty as well as the incentive of anticipated benefit of any kind beyond the satisfaction which flows from the performance of a generous act."

This Court considered and rejected three contentions advanced by the commissioner.

The first of such contentions was that, since the donors had benefitted by past services of the donees, there was no gift. This Court found that there was a natural inference that the donees had been fully compensated for their services.

In the case at bar, it is not necessary to infer full payment for services. The record shows repeatedly that the donee had received his full and adequate salary of $22,500, and as Judge Hincks aptly pointed out (R 88), the salary was "almost twice that later provided for his successor."

Secondly, it was asserted in *Bogardus* that the informal expression "gift or honorarium" determined the nature of the payment to be compensation. This Court found that the addition of the word "honorarium" did not vitiate the word "gift", which, in the circumstances in which the expressions were employed, clearly indicated the true intent and meaning. In the case at bar, of course, such question is not involved, because the only word used is the word "gratuity", which cannot conceivably have any meaning other than outright gift.

It may well be that the majority below in the case at bar misled themselves by repeated use of the word "honorarium", and having settled upon that word, which does not appear in this record, deduced a decision, not only at vari-

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[9] *Ibid.*, 41.

ance with the law but also in flat contradiction to the explicit record. The donative resolution stated (R 62):

"a gratuity • • • is hereby awarded • • •."

The third contention of the Commissioner was that, in a subsequent resolution to effectuate the gift, the word "bonus" had been employed. In the present case the only resolution is the donative resolution awarding a "gratuity." The act of the donor in the present case, as demonstrated by the entire record without any contrary evidence, was to make and complete a gift, pursuant to such resolution.

This Court, in its final conclusion, referred again to the fact that the gift was made in recognition of past loyal services. Quite obviously, departed faithful stewards are not excluded from the class of people to whom gifts may be made, and equally obvious is the fact that any such exclusion of a class of persons from those who may be deemed donees for tax purposes would have to be by a subclassification made by Congress, and not by others. In the case at bar, of course, the gratuity was awarded in appreciation of ten years of faithful service, a situation identical to that in *Bogardus*.

The short dissent[10] of Mr. Justice Brandeis turned on the proper deference of appellate courts for the trier of fact. Mr. Justice Brandeis observed that, had he been the trier of fact, he might have found a gift, but felt that the findings of fact should not be disturbed. If there is any slight difference of substantive law in the dissenting opinion, it only serves to emphasize the erroneous position taken by the majority below in the case at bar. Mr. Justice Brandeis and those voting with him would certainly be satisfied that where a donee who had received a salary

[10] *Ibid.*, 44 and 45.

of $22,500 for managing the real estate of a church resigned, and his successor was paid only half as much, that the donation of a flat amount could hardly be to "requite" him more fully. Surely "full acquittance" has been given, where one who afterwards receives a flat sum as a gift was formerly, during his employment, paid nearly double what his successor received. Moreover, the record here is replete with testimony showing "goodwill, esteem, or kindliness" which are the very words employed by Mr. Justice Brandeis. Surely, the testimony quoted (pp. 6-8 *supra*) constitutes at least what Mr. Justice Brandeis called "a fair basis in the evidence" upon which the trial judge could properly make a finding there was a gift.

Comparing the two cases, then, *Bogardus* affirmatively held that a gift could be inspired by gratitude for past faithful services, while the case at bar holds gratitude or appreciation to vitiate a gift.

Thus, over strong dissent, the majority below were constrained to engraft an exception upon the statute—to hold gifts to departed faithful stewards to be taxable. This judge-made exception to a clear statute, previously construed by this Court, can no more be justified than could engrafting an exception to tax gifts to blood relatives as income, since they, according to the ancient formula, receive gifts in consideration of love and affection.

Surely the class of departed faithful stewards must be as numerous, or nearly so, as that of blood relatives, and there is no more statutory warrant for taxing gifts to the one class than there is to the other.

Certainly, there is nothing in Mr. Justice Brandeis' dissent which would establish a subclassification of faithful retainers ineligible to receive gifts free of income tax, regardless of the finding of a trial court. Therefore, the

case at bar conflicts with both of the opinions in this Court and the views of all of the Justices.

Of course, this Court's decision should not be misconceived to mean the determination of a gift is purely a matter of "law". The largely stipulated record in *Bogardus*—in which the Court found "no support in the primary and evidentiary facts"[11] for the decision below—determined the legal consequences set forth in the opinion.

Before turning to a discussion of subsequent authority, it is well to consider that neither Trinity Church nor its subsidiary "deducted" the gratuity as an expense for business purposes (R 23, 38). In other types of cases, where a commercial corporation purports to make a gift, the manner in which such commercial corporation treats the payment in its own books and tax returns may appear to this Court to be one of the elements which should be taken into consideration as having a tendency to show whether a gift was, in fact, made. In *Bogardus*, the disbursements were charged to surplus, and not deducted from income. In the case at bar, the payments were charged to gratuities, and the question of deductibility by the donor does not arise.

Naturally, the Tax Court has had occasion frequently to follow the *Bogardus* case. For example, it has happily expressed the standard in a situation where an attorney had successfully attacked the land laws of California which precluded ownership of real property by Japanese. Even though he received no compensation whatever for legal services, when persons of Japanese ancestry presented to him $10,000, the Tax Court properly found a gift was intended and that there was no taxable income to him. The Tax Court stated:

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[11] *Ibid.*, 39.

> "Respondent fails to distinguish between the motivating factor for making the payment and the intent with which the payment was made." *Wright* v. *C. I. R.*, 30 TC 392, 394.

This is one of the decisions demonstrating that the Tax Court experiences no difficulty in applying the statute as construed in *Bogardus*. Together with other courts,[12] it has found the legal standard to be clear and one which permits a fair and intelligent decision on the facts.

The *Wright* case was specifically called to the attention of the court below, as was *Abernethy* v. *C. I. R.*, 211 F. 2d 651, C. A. D. C., which is truly an identical case in that the church body voted payment "• • • in appreciation of his long and faithful service". Trinity Church in the case at bar voted payment to Stanton "in appreciation of the services rendered by Mr. Stanton . . . throughout nearly ten years." The purported distinction by the majority between religious and secular employees is both irrelevant and gratuitous and, as the dissenting opinion fully pointed out, Stanton was not isolated from personal contact with the vestry.

But rather than following such extraordinarily similar and helpful cases, the majority below commenced its discussion of the law by referring to two of its own decisions which involved wholly different facts. Moreover, in both of such decisions, the appellate court affirmed the findings of fact of the trial court.

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[12] For example, courts have readily applied *Bogardus*, without seeking refined instructions from this Court, in the following cases, among many:

*Bounds* v. *U. S.*, 262 F. 2d 876, C. A. 4;
*Schall* v. *C. I. R.*, 174 F. 2d 893, C. A. 5;
*Mutch* v. *C. I. R.*, 209 F. 2d 390, C. A. 3;
*Hershman* v. *Kavanagh* (E. D. Mich.), 120 F. Supp. 956; aff'd 210 F. 2d 654, C. A. 6.

They referred to *Nickelsberg* v. *Commissioner*, 154 F. 2d 70, where a 74% stockholder received $7,500 as a "wedding gift" from the very entity which he dominated. Such a transparent contrivance did not commend itself to the Tax Court as creating a gift, and the findings of fact by the Tax Court were not set aside by the Court of Appeals.

Indeed, the *Nickelsberg* case more properly should have been referred to by the majority—not with respect to the question of statutory construction before the Court, but rather with respect to the refusal of the appellate court to disturb the findings of fact by the trial court. Such a case is clearly distinguishable from *Stanton*, where the recipient was never a vestryman; where he had terminated his employment relationship; and had no proprietary interest, as stockholder or otherwise, in Trinity Church and its wholly owned subsidiary. He therefore could never be considered to be in the same category as the majority stockholder-recipient in the *Nickelsberg* case.

Little light is cast upon the question by the other Second Circuit case referred to by the majority, *Carragan* v. *Commissioner*, 197 F. 2d 246, where an employee whose pay had been deliberately held down to a subsistence level to build up the assets of the company received additional compensation when interruptions of the Second World War made continuation of the company's business in the Far East impossible. The additional payment was to make up for past sacrifices.

Stanton, by contrast, received a salary of $22,500 per annum and resigned to go into business for himself. His successor received little more than half as large a salary.

The majority below in the case at bar in the final paragraphs of their opinion candidly stated that their resolution of the case was unsatisfactory (R. 85). No occasion for

their perplexity would have arisen had they either followed Mr. Justice Brandeis' dissent in *Bogardus* and not disturbed the trial judge's findings, or had they properly applied the standard of law established by the majority of this Court that a gift may properly be "in recognition of" and not "in payment for" past services.

The majority below first tried to do too much in reformulating the statute and adding to it burdens which Congress did not impose. Then they expressed their incapacity to do so satisfactorily, and cast the entire burden back on the "taxing authorities". In so doing, the majority took away from the trial court its traditional function of determining fact questions, such as "negligence", "intent", "wilfulness", "reasonableness", etc., and lodged the responsibility for making such fact determinations in the two places least capable of making such determination, namely the executive branch ("taxing authorities") and appellate courts.

The result is unworkable, unfair, and directly contrary to the meaning and scope of this Court's prior interpretation, which Congress has necessarily adopted in successive amendments to the Internal Revenue Code.

## III.

### The findings of fact of the district court were not "clearly erroneous".

Upon the conclusion of the testimony, the trial judge made the following finding of fact (R. 60):

> "The resolution of the Board of Directors of the Trinity Operating Company, Incorporated, held November 19, 1942, after the resignations had been accepted of the plaintiff from his positions as controller of the corporation of the Trinity Church, and

the president of the Trinity Operating Company, Incorporated, whereby a gratuity was voted to the plaintiff, Alden D. Stanton, in the amount of $20,000 payable to him in monthly installments of $2,000 each, commencing with the month of December, 1942, constituted a gift to the taxpayer, and therefore need not have been reported by him as income for the taxable years 1942, or 1943.

The finding of fact was made after listening to the testimony of witnesses relating to the following evidentiary facts, among others.

1. The resolution of the Board of Directors of Trinity Operating Company, Inc., (all of whom were vestrymen of Trinity) which was ratified by the full vestry of Trinity Church, provided that the payment to Stanton was a gratuity, such resolution stating that "a gratuity is hereby awarded to him of twenty thousand dollars" (R 72).

2. Prior to Stanton's resignation he had been paid in full for all services rendered by him (R 22, 38).

3. Two weeks after Stanton's resignation had been accepted, the resolution was adopted which awarded him the gift, and Stanton had no voice or control in the voting of the payment to him (R 25, 26, 38, 52).

4. Stanton was not discharged, nor was the termination of employment made necessary by circumstances beyond his control. He desired to set up his own business. He was requested to reconsider his resignation and stay with Trinity (R 37, 22).

5. Stanton did not do anything or refrain from doing anything or perform any services in connection with the gift to him, nor was any request made of him

to do anything or refrain from doing anything (R 25, 37, 52, 55).

6. There was no business purpose to be served nor any necessity for Trinity Church or its subsidiary to retain or obtain Stanton's good will in the future, and the payments to Stanton were not made with any such purpose in mind (R 25, 38).

7. All the stock of Trinity Operating Company, Inc. was owned by the Corporation of Trinity Church and the Church ratified the resolution and paid approximately half the gift (R 6, 12).

8. The payments to Stanton were entered on the books of Trinity Operating Company, Inc. and the Corporation of Trinity Church as a gratuity (R 32, 33).

9. No information returns were filed by Trinity Operating Company, Inc. or the Corporation of Trinity Church with respect to the payments to Stanton (R 23, 38).

10. Trinity Operating Company, Inc. and the Corporation of Trinity Church did not withhold Victory or other income taxes with respect to the payments made in 1943 as they would have been required to do had the payments been additional compensation for services. It was not necessary to withhold taxes if the payments were a gift (R 23, 38).

11. Finally, the record consists of oral testimony explicitly describing the payment as a gift from disinterested donors (see pp. 6-8 *supra*).

Judge Hincks, dissenting below, stated:

"Surely the finding below was not clearly erroneous within the purview of Federal Rules of Civil

Procedure, Rule 52, 28 U. S. C. A. Findings by a trial judge, just as those by the Tax Court, may not be disturbed unless clearly erroneous. Plaut *v.* Munford, 2 Cir. 188 F. 2d 543; Smith *v.* Hoey, 2 Cir. 153 F. 2d 846; Scott *v.* Self, 8 Cir. 208 F. 2d 125; Smyth *v.* Barneson, 9 Cir. 181 F. 2d 143. In other areas of tax law, questions going to intent have generally been dealt with as questions of fact. See United States *v.* Wells, 283 U. S. 102, 51 S. Ct. 446, 75 L. Ed. 867; Wickwire *v.* Reinecke, 275 U. S. 101, 48 S. Ct. 43, 72 L. Ed. 184; Blakeslee *v.* Smith, 2 Cir., 110 F. 2d 364; White *v.* Bingham, 1 Cir. 25 F. 2d 837; Jahn *v.* Pedrick, 2 Cir., 229 F. 2d 71; Keefe *v.* Cote, 1 Cir., 213 F. 2d 651. See also case note on Bogardus *v.* Helvering, 2 Cir., 88 F. 2d 646; 51 Harv. L. Rev. 167. In Peters *v.* Smith, supra, it was held that a jury finding that a payment was a gift, when made on conflicting evidence, may not be set aside."

Commencing with the resolution itself, the formal act of a responsible institution which can be read only as effectuating a gift, the record is completely clear that the individuals who voted for such resolution did so with the intention that it be a gift, and that it be given and received as an expression of personal affection, appreciation, respect, admiration and regard. It is, therefore, certain that the majority erred in its redetermination of facts, as the dissenting opinion so clearly points out. At the very least, there was evidence before the trial court from which a gift could properly have been inferred, and a gift was inferred. This is what the appellate court reversed.

The majority opinion is replete with patent errors, furnishing an object lesson in the wisdom of adhering to statutory limitations upon appellate review, and the expression thereof in Rule 52. Such errors include:

(a) Patent error in that the recital of facts of the majority opinion refers to Mr. Stanton's resignation and then states:

> "* * * and a few days previously the Operating Company had passed a resolution * * *." (R 82)

In point of time, the situation was the *opposite*. That is, Stanton resigned. His resignation was accepted on November 5th. Two weeks thereafter on November 19th the gift was made by resolution. The majority apparently were misled by the fact that the effective date of Stanton's resignation was the end of the month. This error has materially influenced the majority in that the majority distinguished the authority of *Bogardus* upon the apparent ground that there the donating corporation had ceased having an employer-employee relationship with the donees. For that reason the patent error in the sequence of events appears to have been crucial, since no part of the gift was received until after Stanton had left Trinity.

(b) Another patent error is the misreading of a proviso in the donative resolution that Trinity Church was released from all rights and claims to pension and retirement benefits "not already *accrued* up to November 30, 1942" (emphasis added). That date was the effective date of the resignation submitted the early part of the month. The gratuity was received after November 30. The mistake is in overlooking the word "*accrued*". It is patently erroneous to find as a fact that a person who retained everything that had "*accrued*" gave up anything whatsoever, or, as the majority said, made "assurance doubly sure," especially when the uncontradicted testimony was that nothing was given up.

The proviso plainly means, and was notice to the world, including presumptive heirs, that the gift paid after resignation, gave rise to no *further* accruals of pension rights, thereby emphasizing that the payment was a gift and not compensation.

It is apparent that the majority must again have been confused with respect to sequence of events, and it is patent that the word "accrued" was overlooked. This point, neither briefed nor argued below, resulted from the majority's making their own way through the evidence, without due deference to the trial judge.

(c) A third patent error is the majority's statement:

> "* * * there is no evidence that personal affection did enter into the payment * * *."

All the oral testimony bespeaks the contrary, as the dissent shows. True, the resolution is not effusive, nor is the testimony. The vestry and their counsel spoke in character. Their desire to be a benefactor was aptly expressed. The gift was effectuated decently and in order. Moreover, affection is not a criterion; it would simply be some evidence tending to show a gift.

From all of the foregoing, it is absolutely certain that there were primary and evidentiary facts in the record adequate to support the trial judge's finding that there was a gift and the legal conclusion that no taxes arose. The District Judge's determination was not "clearly erroneous".

## Conclusion.

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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